United Government Security Officers of America International and its Local 129 *and* Joseph Anthony Farrell *and* David Wehrer. Cases 04–CB–192246, 04–CB–207347, and 04–CB–208578

October 4, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On June 4, 2018, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief. In addition, the General Counsel filed limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

A. Respondent United Government Security Officers of America International, East Wareham, Massachusetts, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Arbitrarily and discriminatorily refusing to process a grievance with respect to employee Joseph Farrell's past union seniority and/or failing to grant him such past seniority on its own with the approval of the Employer.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately grant Joseph Farrell's past union seniority to the date of his original hire, and, to the extent necessary, promptly request Farrell's employer to concur with that grant of past seniority.

(b) Make Joseph Farrell whole for any loss of pay and/or benefits he may have suffered as a result of the unlawful denial of his past union seniority, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Reimburse Joseph Farrell for the reasonable legal fees expended in connection with his use of a private attorney from the date of his engagement of such attorney to the date he filed his first charge in this case.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an elec-

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that Respondent Local 129 violated Sec. 8(b)(2) and (1)(A) by attempting to cause the Employer to discriminate against employee Joseph Farrell because of his union and protected activities. There are also no exceptions to the judge's dismissal of allegations that the Respondents violated Sec. 8(b)(2) and (1)(A) by attempting to cause the Employer to discriminate against employee David Wehrer because of his union and protected activities, and that the Respondents' reliance on the vote of Local 129's membership in refusing to restore Farrell's seniority independently violated the Respondents' duty of fair representation.

The judge stated that the Respondents did not raise their 10(b) defense until they submitted their posthearing brief. In fact, the Respondents included a 10(b) defense in their initial answer to the complaint. However, that defense was insufficiently specific and was not litigated during the hearing. As such, we agree with the judge's finding that the Respondents waived the defense. See, e.g., *Atelier Condominium*, 361 NLRB 966, 1001 (2014), enfd. mem. 653 Fed.Appx. 62 (2d Cir. 2016). Even if we were to find that the Respondents did not waive their 10(b) defense, we would adopt the judge's alternative finding that the charge was timely filed, as the Respondents' denial of Farrell's seniority in October 2016 was discrete from the Respondents' failure to address the seniority issue in settling Farrell's earlier grievance.

We correct the judge's statement that it took almost a year for Farrell to be medically cleared for work after his September 2015 grievance settlement. The record establishes that Farrell was medically cleared as of May 2015. We find that this error did not affect the judge's analysis, as the judge correctly found that Farrell did not return to work for almost a year after the settlement.

[2] We amend the judge's remedy in two respects. First, backpay for the denial of Joseph Farrell's seniority shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The *Ogle Protection* formula applies where, as here, the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." Id. at 683; see also *Pepsi America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003). Second, the judge provided both tax compensation and social security reporting remedies, but only the tax compensation remedy is appropriate here. See *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101, 103 fn. 12 (2014) ("[B]ackpay owed by a respondent that has never been an employer of the discriminatee is not considered wages for FICA purposes, so there is no withholding obligation and no employer contribution is payable.").

We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found and substitute new notices to conform to the Order as modified.

tronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its union office in Scranton, Pennsylvania, copies of the attached notice marked "Appendix A."[3] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 14 days after service by the Region, deliver to the Regional Director for Region 4 signed copies of the notice in sufficient number for posting by Paragon Systems, Inc. at its Scranton, Pennsylvania facility, if it wishes, in all places where notices to employees are customarily posted.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Respondent United Government Security Officers of America Local 129, Scranton, Pennsylvania, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Arbitrarily and discriminatorily refusing to process a grievance with respect to employee Joseph Farrell's past union seniority and/or failing to grant him such past seniority on its own with the approval of the Employer.

(b) Attempting to cause Joseph Farrell's employer to discriminate against him because of his union and protected concerted activities.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately grant Joseph Farrell's past union seniority to the date of his original hire, and, to the extent necessary, promptly request Farrell's employer to concur with that grant of past seniority.

(b) Make Joseph Farrell whole for any loss of pay and/or benefits he may have suffered as a result of the unlawful denial of his past union seniority, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Reimburse Joseph Farrell for the reasonable legal fees expended in connection with his use of a private attorney from the date of his engagement of such attorney to the date he filed his first charge in this case.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its union office in Scranton, Pennsylvania, copies of the attached notice marked "Appendix B."[4] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 14 days after service by the Region, deliver to the Regional Director for Region 4 signed copies of the notice in sufficient number for posting by Paragon Systems, Inc. at its Scranton, Pennsylvania facility, if it wishes, in all places where notices to employees are customarily posted.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 4, 2018

_____
John F. Ring, Chairman

_____
Lauren McFerran, Member

_____
Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT arbitrarily or discriminatorily refuse to process grievances with respect to your past union seniority and/or fail to grant you such seniority on our own, with the approval of your employer.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL immediately grant Joseph Farrell's past union seniority to the date of his original hire and, to the extent necessary, request Joseph Farrell's employer to concur.

WE WILL make Joseph Farrell whole for any loss of pay and/or benefits he may have suffered because of our unlawful denial of his past union seniority, with interest.

WE WILL reimburse Joseph Farrell for reasonable legal fees he expended because of his need to hire a private attorney to help resolve his seniority issue.

UNITED STATES GOVERNMENT SECURITY OFFICERS OF AMERICA INTERNATIONAL AND ITS LOCAL 129

The Board's decision can be found at https://www.nlrb.gov/case/04-CB-192246 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT arbitrarily or discriminatorily refuse to process grievances with respect to your past union seniority and/or fail to grant you such seniority on our own, with the approval of your employer.

WE WILL NOT attempt to cause Joseph Farrell's employer to discriminate against him for exercising his rights under the Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL immediately grant Joseph Farrell's past union seniority to the date of his original hire and, to the extent necessary, request Joseph Farrell's employer to concur.

WE WILL make Joseph Farrell whole for any loss of pay and/or benefits he may have suffered because of our unlawful denial of his past union seniority, with interest.

WE WILL reimburse Joseph Farrell for reasonable legal fees he expended because of his need to hire a private attorney to help resolve his seniority issue.

LOCAL 129 OF THE UNITED STATES GOVERNMENT SECURITY OFFFICERS OF AMERICA INTERNATIONAL

The Board's decision can be found at https://www.nlrb.gov/case/04-CB-192246 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Patrice Tisdale, Esq., for the General Counsel.
Alan J. McDonald, Esq., Southborough, Massachusetts, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. The hearing in this case opened on March 5, 2018, in Philadelphia, Pennsylvania, and concluded on April 30, 2018, by telephone. The consolidated complaint, as amended, alleges that Respondents (the International and Local 129) violated Section 8(b)(1)(A) of the Act by violating their duty of fair representation in the failure to restore the past seniority of Charging Party Joseph Farrell upon his return to work from a medical leave of absence. The consolidated complaint also alleges that Respondent Local 129 complained about Farrell and Charging Party David Wehrer to their employer in an attempt to cause their employer to discriminate against them for engaging in protected union and concerted activity and in violation of Local 129's duty of fair representation, thus violating Section 8(b)(2) and (1)(A) of the Act. The Respondents filed answers denying the essential allegations in the complaint.[1]

The General Counsel and Respondents filed post-hearing briefs, which I have read and considered. Based on those briefs and the entire record in the case, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

It is admitted that Respondents are labor organizations within the meaning of Section 2(5) of the Act. It is also admitted that the employers named in this matter, Akal Security, Inc. (Akal) and Paragon Systems, Inc. (Paragon), are employers within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

The Facts

Background

For a number of years, employers have provided court security officers at the William J. Nealton Federal Building and United States Courthouse in Scranton, Pennsylvania under a contract with the United States Marshals Service. Most recently the employers of those officers have been Akal and Paragon, whose employees were represented by the Respondents in the following unit:

> All full-time and shared position Federal Court Security Officers (CSOs),Federal Special Security Officers (SSOs), Lead Federal Court Security Officers (LCSOs) and Lead Federal Special Security Officers (LSSOs) employed by Employer in the 3rd Circuit consisting of UGSOA Local 129, in the Middle District of the State of Pennsylvania in the City of Scranton, excluding all other employees including office clerical employees and professional employees as defined in the National Labor Relations Act.

Recognition of the Respondents in the above unit of some 25 security officers has been embodied in successive collective bargaining agreements between them and the relevant employers covering the terms and conditions of employment of the security officers, including a grievance and arbitration provision. At all material times until November 30, 2017, the agreement was with Akal; and, at all material times, since December 1, 2017, the agreement was with Paragon. The agreement lists both Respondents, the International and Local 129, as parties to the most recent agreement, which is effective from October 1, 2015 through September 30, 2018. Jt. Exh. 1.[2]

[1] During the telephone session, the parties submitted a stipulation (Jt. Exh. 12) that referred to a number of joint exhibits which were received in evidence. Although both parties agreed to the authenticity of Jt. Exhs. 3 and 4, Respondents objected to their admissibility on the grounds that they contained substantial hearsay and were irrelevant. I agree with Respondents on Jt. Exh 4 and reject that exhibit, but I will admit Jt. Exh. 3 because it is a business record of an investigation with relevance to this case .

[2] It was stipulated that, although this most recent agreement names Akal as the employer, it also applies to Paragon. Tr. 237. Because

At all material times, Jeffrey Miller has been the International Director and Divisional Vice President for the Court Security Officers Program for Respondent International and an admitted agent of Respondent International within the meaning of Section 2(13) of the Act. Also, at all material times since 2014, Security Officer Daniel Wigley has been the president of Respondent Local 129 and Security Officer Robert Reuther has been the vice president of Respondent Local 129. Both are admitted agents of Respondent Local 129 within the meaning of Section 2(13) of the Act.

Wigley and Reuther were elected to their union offices in 2014 and reelected each year since. Tr. 210–212. Prior to 2014, Security Officer Joseph Farrell was an officer of Local 129, serving as secretary-treasurer for three years. Tr. 77–78,111. Security Officer Thomas Sivahop was also an officer of Local 129, serving as vice-president until 2014. Tr. 137–138.

It appears that there was some animosity between the old and the new officers of Local 129. While Farrell and Sivahop were officers of Local 129, they were instrumental in processing a grievance with the Employer over the reprimand of a group of security officers who were allegedly involved in time fraud. Wigley and Reuther were among the employees named as offenders. The grievance was rejected by the Employer because it was filed out of time. The International was consulted and decided not to go forward on the matter. At some point, the local union agreed to financially aid the employees to process the grievance or complain about the reprimands, then changed that decision. Tr. 137–143, 77–80. At the time, Wigley and Reuther complained to Sivahop and Farrell about the failure to support them in the grievance. Farrell's uncontradicted testimony is that both Wigley and Reuther approached him about the matter and Wigley was particularly angry at him. Tr. 79-80. Sivahop's uncontradicted testimony is that Wigley complained to him at the time and angrily spoke disparagingly of Farrell; he also testified, again without contradiction, that he and Reuther have not spoken since he denied financial support for the grievance. The time fraud issue was finally put to rest when Sivahop later confirmed with the Employer's representative in Scranton that the reprimands were no longer in the Employer's files. Tr. 142–143.

The animosity described above carried over to the present dispute. The major issue in this case involves the treatment, with respect to past seniority, of Security Officers Robert Reuther and Joseph Farrell, when they returned to work after coming off medical leave. As set forth below, the circumstances and the governing seniority language (Tr. 189) were the same in both situations. But the two security officers were treated differently with respect to the grant of past seniority.

Rules on Security Officers Returned to Employment After Removal from the Contract and Their Seniority

The contract between the Employer and the U.S. Marshals Service provides for the removal of a security officer from the contract. The Employer's Scranton District Superintendent, George Kamage, gave the following credible and uncontradicted testimony as to how the Employer handles such situations. The Employer removes a security officer from the U.S. Marshals contract in Scranton for a number of reasons, not all of them due to discharge or permanent termination. Removal from the contract could be caused by a medical leave of absence such as a stint on workmen's compensation. Someone is then hired to replace that person. The Employer submits a U.S. Marshals Service form, titled Court Security Staffing Notification, to the Service when this is done. The form asks for the name of the security officer who is being replaced, the reason for the replacement, whether the position is permanent or temporary, and the name of the replacement officer. GC Exh. 2, Tr. 18-20. Not all security officers who are removed under this procedure have the opportunity to return to their position. One group, however, is permitted to return. A person who is removed from the contract because of a medical leave of absence or workmen's compensation is entitled to reapply for the position once the condition for which he or she was removed has been rectified. Tr. 21, 48–49, GC Exh. 7.

There are two kinds of seniority at the Scranton location: One is union seniority, which is used for job selection and bidding for particular jobs, including hours worked. The other is company seniority, which is used for vacations and benefits. The collective bargaining agreement contains a provision on union seniority, but the Employer leaves union seniority totally up to the Respondents. Tr. 17, 23, GC Exhs. 20 and 29. The contractual seniority provision (Jt. Exh. 1, art. 2) provides that an employee's seniority "shall be" terminated for any of the following reasons (sec. 2.2):

> A. the Employee quits or retires;
> B. the Employee is discharged for just cause;
> C. a settlement with the Employee has been made for total disability, or for any other reason if the settlement waives further employment rights with the Employer;
> D. the Employee is laid off for a continuous period of one hundred eighty (180) calendar days;
> E. the Employee is permanently transferred out of the bargaining unit.

The seniority provision also provides that union seniority "shall be" reinstated for any of the following reasons (Section 2.3):

> A. An Employee returned to work after overturning a medical disqualification shall regain their seniority to the original date of hire; and
> B. An Employee returned to work after overturning a discipline termination shall regain their seniority back to original date of hire.

Reuther's Release and Return from Medical Leave, Later Regaining His Original Seniority

Robert Reuther was first hired as a security officer at the Scranton location by a predecessor employer, MVM, Inc., on November 8, 2004. He worked until injured in a fall on May 7, 2005. He was then placed on workmen's compensation and thereafter released without prejudice effective June 8, 2008 because he did not meet the physical standard required for the position. G.C. Exhs. 8 and 23. In a July 25, 2008 letter from an MMV official, Reuther was told that this did "not change the

some of the events in this case occurred when Akal was the employer and some when Paragon was the employer, I shall sometimes refer to one or the other by the generic term, the Employer.

benefits you are receiving under Worker's Compensation. Once you are able to meet the physical standards of the position, you are encouraged to reapply." GC Exh. 23. Reuther was rehired in March of 2012 by District Superintendent George Kamage. Tr. 16–17.

When he returned to work in Scranton, Reuther was apparently listed on the seniority list as having seniority from the date of his rehire in March of 2012. In an undated letter from Reuther to Respondent International that came to the attention of International Representative Miller, Reuther requested restoration of his past seniority. The letter states that he was cleared for duty by his orthopedic surgeon on January 12, 2012, and was rehired on March 30, 2012. In the letter, Reuther asks that his seniority be restored to his original hire date because he was injured in the performance of his duties as a security officer and kept in touch with his union representatives and his superiors in the interim. GC Exh. 8, Tr. 70–71.

In February of 2013, after receiving Reuther's letter, International Representative Jeffrey Miller had an email exchange with Maureen Dolan of Akal about Reuther's union seniority and company seniority. Miller sought past seniority for Reuther to his original hire date in 2004, stating that Reuther should never have been "fired" by Akal because he was on workmen's compensation due to an on-the-job injury. In an email response, Dolan stated as follows: "If the union wants to date his seniority back to 2004, the Company would not object. But for the purpose of benefits, he is a new hire as of March 30, 2012." GC Exh. 29. Sometime in early March of 2013, District Superintendent Kamage received a telephone call from one of his superiors and was told about Reuther's letter discussed above. He was asked whether he had any objection to the restoration of Reuther's past seniority. He replied he did not object because, as he testified, union seniority is "totally up to the Union." As a result, Reuther's union seniority was restored back to 2004, his original hire date. Tr. 16–17.

It appears that there was at least one grievance filed over the decision to grant Reuther his past union seniority. One of the security officers, Robert Snell, whose seniority was adversely affected by the decision granting Reuther's past seniority, filed a grievance with District Superintendent Kamage protesting that decision. Kamage rejected the grievance, because, as he testified, union seniority was up to Respondents and was not the Employer's "business," but he was unsure how the matter was eventually resolved. Tr. 17–18, 59. In the interim, International Representative Jeffrey Miller resolved the issue of Reuther's past seniority in discussions with the Employer, as mentioned above.

In an exchange of e-mails in March of 2013 that are part of GC Exh. 16, discussed later in this decision, Farrell, who was an officer of Local 129 and handling Snell's grievance, and perhaps others, at the time, vigorously protested Miller's resolution of Reuther's past seniority. In a lengthy discourse citing and discussing relevant seniority and other provisions of the collective bargaining agreement, Farrell asserted that the grant of Reuther's past seniority was contrary to the bargaining agreement and unfair to other security officers in the unit. He also told Miller that his resolution of the matter placed a burden on the grievants going forward and that the matter had not been discussed or cleared with local union officials. Nothing further appears in the record concerning the resolution of the Snell grievance or any other grievance that may have been pending at the time, so I assume that it and any other grievances were dropped in accordance with Miller's grant of past union seniority to Reuther.

The parties entered into a stipulation that contained text message exchanges between Reuther and Miller in February and March of 2013 about the restoration of Reuther's past union seniority. The exchanges include Reuther's concerns about Farrell's grievance over the restoration of his past union seniority and Reuther's view that the contractual seniority provision supported Miller's decision to grant such past union seniority. Jt. Exhs. 8 and 12.

Farrell's Release and Efforts to Return with his Original Seniority

Security Officer Joseph Farrell was first hired by the Employer on October 10, 2008. As of March 21, 2014 he went on a medical leave of absence related to a workmen's compensation claim. In a January 14, 2015 letter from the Employer, Farrell was told that his medical qualification had lapsed because his last annual medical examination was taken on November 20, 2013. He was removed from the Marshals Service contract with the notation that, once he was again cleared for work and a position was available, he could reapply. R. Exh. 1.

Shortly thereafter, on January 20, 2015, a copy of the Marshals Service form discussed above was processed for Farrell by District Superintendent Kamage, specifically noting that Farrell was removed from the contract because he was placed on workmen's compensation. GC Exh. 2. It is clear that Farrell was not considered terminated by the Employer. As shown above, according to District Superintendent Kamage's testimony about those removed from the contract due to workmen's compensation, as was Farrell, those employees were entitled to reapply when they became physically able to return. Akal also separately confirmed that Farrell's removal from the contract did not mean that he was terminated and he remained an employee. See Akal's letter of February 17, 2015, discussed below, and a December 2, 2016 email sent to Farrell's private counsel, in which Akal's counsel stated that Farrell "was not terminated by Akal Security. He was removed from the contract for a period of time due to an extended medical leave." GC Exh. 20.[3]

Nor was Farrell's continued employment affected by his failure to take his annual physical in November 2014 while he was on workmen's compensation. Uncontradicted and credible testimony shows that Farrell specifically asked about his physical at the time and District Superintendent Kamage specifically told Farrell that he was excused from taking the physical while he was on workmen's compensation. Kamage said there would

[3] The email was in response to a November 7, 2016 letter sent by Farrell's private attorney to representatives of Respondents and the Employer requesting that the Respondents initiate a grievance and arbitration proceeding to restore Farrell's past seniority. The email follows the letter, which is the first page of GC Exh. 20. The exhibit is discussed in greater detail later in this decision.

be no physical at that time. Tr. 53–58, 68, 89. [4]

Despite the above, at the time of Farrell's removal from the contract, Farrell's status was not clear, at least to Farrell and Respondents. Upon his receipt of the removal letter from the Employer, Farrell immediately contacted International Representative Tim Crume. Tr. 81. Respondents thereafter filed a grievance on this matter. The grievance, dated January 16, 2015, was titled, "Termination without just cause." GC Exh. 9. See also R. Exh. 2. Akal denied the grievance in a February 17, 2015 letter, stating that the grievance was denied because the Employer considered the matter a "lapsed qualification" case that was a matter of management rights and not grievable under the collective bargaining agreement. The Employer's letter also stated that Farrell was "currently an employee of Akal Security" and could reapply to return to the Marshals Service contract. GC Exh. 10.

The grievance continued to be processed, however, and, on March 11, 2015, International Representative Crume submitted a request for arbitration. GC Exh. 24. On the next day, March 12, 2015, Crume also asked for information from the Employer regarding the removal. GC Exh. 25.

During the next several months, Farrell and Crume exchanged e-mails about the grievance and arbitration. Tr. 85–88. At this time, Farrell was still on workmen's compensation and he was concerned that the Employer would not pay for a physical while he was on workmen's compensation. In an April 28, 2015 email to Crume, Farrell stated that he wanted Respondent to address not only reemployment issues, but also workmen's compensation issues. He understood that he would have to reapply when he was able to return to work, but he was concerned that the Employer would offer to bring him back on limited duty, to which he objected. Farrell also mentioned that the local union leadership harbored animus against him because of his actions when he was a former local union officer. GC Exh. 11.

On May 13, 2015, Farrell sent an email to Crume suggesting he was amenable to a settlement on the following conditions: 1. When his condition improves, he would reapply and be reappointed to the first vacancy; 2. His seniority would be reinstated and considered overturning a medical qualification; and 3. He would meet the qualification if he were able to return in 3 years. Farrell stated that the only thing he wished to preserve were "rights similar to those given to Robert Reuther, who received a workers compensation settlement after an alleged workers compensation injury, and was able to return to the position upon medical clearance with total seniority and able to jump over all applicants." GC Exh. 12. Farrell testified that, at this time, he wanted to make sure that he received his back seniority just as Reuther did. He emphasized that he was familiar with Reuther's seniority determination because he, Farrell, was a union officer at the time and was involved in that matter. Crume did not respond to Farrell's concerns about his past seniority. Tr. 86–88.

Thereafter, the Respondents and the Employer entered into settlement discussions. Tr. 85, 88; and see GC Exhs. 26 and 27. On September 9, 2015, Respondent International's president, Desiree Sullivan, sent an email to Akal Representative Maureen Dolan with an attached settlement agreement for her signature. The settlement agreement referenced the arbitration which had been docketed for hearing by the Federal Mediation and Conciliation Service. In response, Dolan made redline changes in the draft agreement and sent it back to Sullivan. GC Exh. 28.

On September 16, 2015, Crume sent Farrell a copy of the signed settlement agreement between Akal and Respondents, dated September 9, 2015. The final signed agreement included the changes suggested by Dolan. But it contained nothing about Farrell's past seniority. G.C. Exh.13, Tr. 89.

On the same day, Farrell responded to Crume by email stating that he objected to the settlement because he was not consulted beforehand, and it did not include immediate reinstatement or a favorable resolution of his past seniority. He mentioned his past discussions with Crume about being treated similar to Reuther with respect to past seniority and asked if there was any way he could appeal the matter to the International. Crume did not respond, but, in an email the next day, counsel for the International did. Tr. 90, GC Exh. 14. In that email to Farrell, International Counsel Robert Kapitan stated that Respondents could not advocate for Farrell's immediate reinstatement without a medical clearance, but said nothing about the past seniority issue. He also said that there was nothing more that Respondents could do for Farrell and that there was no further appeals process. There was another exchange of emails between Farrell and Kapitan reflecting the end of the arbitration matter. GC Exh. 14.[5]

Respondents Refuse to Restore Farrell's Original Seniority

It took almost another year after the events set forth above for Farrell to obtain a medical clearance to return to work and for an open position to become available. Tr. 180. In the meantime, at least through March of 2016, Respondents urged the Employer to bring Farrell back. GC Exhs. 5–7, Tr. 182–184.

In anticipation of Farrell's return, sometime in July or August 2016, Kamage posted a new seniority list at the Scranton facility, apparently reflecting Farrell's original seniority. Local 129 Officers Reuther and Wigley approached Kamage and told him he could not post that list because Farrell was not getting his past seniority back. Kamage questioned that statement because he said that Reuther received his past seniority. Either Reuther or Wigley replied that Farrell's situation was "different" and that they had checked with Respondent International, which agreed Farrell would not get his seniority back. Kamage then dropped the matter because union seniority was "union business." He did not restore Farrell's past seniority because he

[4] At the time the requirement was that security officers have a physical every year; at the time of the hearing that had been changed and the physical is now required every 2 years. Tr. 50, 168.

[5] The transcript at page 90 erroneously reflects that Farrell testified that he was satisfied with the settlement. I grant the General Counsel's motion to correct that part of the transcript to reflect that Farrell testified he was "dissatisfied" with the settlement. The Respondents agree to the correction and, indeed, the correction is obvious given the context of the rest of Farrell's testimony and GC Exh. 14.

"was told by the Union not to." Tr. 21–23.[6]

On October 12, 2016, on the advice of International Representative Miller, Local 129 officials decided to take a vote on whether to restore Farrell's past seniority. Tr. 187–188, 214–215. According to Local 129 President Wigley, "we had to decide where [Farrell] falls in seniority." Tr. 215. Wigley testified that the notification and ramifications of the vote were not announced in writing, but only by word of mouth. He also testified that, in his view, the ramifications included a possible change of the seniority provision of the collective bargaining agreement. Tr. 215–216. The ballot was a simple piece of paper that stated, "Reinstate Seniority for Joe Farrell," followed by a choice of "yea" or nay." The nays prevailed. R. Exh. 8, Tr. 216–217.[7]

The Respondents conceded that no similar vote was taken when Reuther's seniority was restored. See Tr. 95–97, 163, 188.

Farrell's Return to Work and Continued Efforts to Restore his Seniority

On October 13, 2016, Farrell, who was a lead security officer in his prior stint with the Employer (Tr. 75-76), returned to work as a regular security officer. Tr. 22, 91, G.C. Exh. 20. On an undetermined date in 2014, but after August 21, 2014, Farrell was number 14 on the seniority list. Because of the decisions made about his union seniority by Respondents, when Farrell returned, he was dead last on the seniority list at number 23. Jt. Exhs. 9, 10 and 12. As a consequence, he now works fewer hours and is classified as a "shared-time or part-time employee." Tr. 73–74, 76, 91.

Upon his return to work, Farrell was notified of the vote by Local 129 members to deny his past seniority. He was very upset and protested the denial of his past seniority to District Superintendent Kamage and to Local 129 President Wigley, specifically mentioning to Wigley the prior grant of past seniority to Reuther. He also called International Representative Miller making the same points to him. He told Miller he wanted to file a grievance over the matter. Miller told him that he told Wigley and Reuther that they had to be careful in handling the issue, but he advised Farrell to "give it a cooling down period." Tr. 91–92.

Farrell followed up these efforts in an October 13, 2016 letter to District Superintendent Kamage and an email to International Representative Miller the same day asking for a restoration of his past seniority. G.C. Exhs. 15 and 16. According to District Superintendent Kamage, from the first day Farrell returned to work in October 2016, Farrell repeatedly complained about his seniority and also submitted grievances about it to him. Those complaints and grievances were not acted upon because Kamage said that union seniority was up to Respondents. Tr. 22–23, 60–62, 65, GC Exh.15

Farrell's email to International Representative Miller on October 13, 2016 asked him to review attached emails regarding the treatment of Reuther's past seniority back in March 2013 in connection with the similar issue of Farrell's past seniority. G.C. Exh. 16. Those attachments were mentioned above in connection with my discussion of Reuther's past seniority. Farrell received no response to his October 13, 2016 email to Miller, but, on November 3, 2016, Farrell received a copy of an email that Miller sent to Local 129 Officers Wigley and Reuther, attaching a document, dated November 3, 2016, addressed to the International's Executive Board, entitled "Response to query regarding case and contract interpretation reference Joseph Farrell," and signed by Miller. That document basically rejected Farrell's claims. Tr. 95, G.C. Exh. 17.

Disappointed in the response he was getting from Respondents, Farrell hired a private attorney to press the seniority issue. Tr. 97–98. On November 7, 2016, the attorney, Frank Tunis, wrote a letter to representatives of Respondents and the Employer. Addressing the Employer, he protested that the Employer had not updated its seniority list to reflect Farrell's past union seniority. Addressing Respondents, he stated that the letter was what he described as a "formal request to the Union to initiate all available grievance and arbitration procedures" to restore Farrell's past seniority as had been done for Reuther. He also reminded Respondents that they had a duty of fair representation, and, if that was not complied with, Farrell would file a charge with the NLRB. GC Exh. 19.

At the time, International Representative Miller responded to Tunis' November 7 letter about Farrell's seniority by telephone. Miller told Tunis that Farrell's employment had previously been terminated for cause and Respondents had no further interest in pursuing the matter, describing it as frivolous. GC

[6] The above is based on the credible and uncontradicted testimony of Kamage.

[7] Reuther testified that the ballot included a statement that the collective bargaining agreement needed to be changed and that there was a document in the room where the vote took place explaining why the vote was being taken. That testimony was contrary to Reuther's pretrial affidavit. Tr. 156–161. Indeed, it is clear that the ballot, which is in evidence, did not contain anything about changing the bargaining agreement. And Reuther's testimony about the explanatory document was contrary to that of Wigley, mentioned above, and two other security guards who testified about the matter. Tr. 225–228. Thus, I discredit Reuther's testimony in this respect. Despite his brief appearance on the witness stand, I found Reuther a thoroughly unreliable witness and I cannot credit any of his testimony in this case unless it constitutes an admission against interest.

Although Wigley testified he told employees that the collective bargaining agreement needed to be changed if Farrell was given his past seniority, Wigley admitted he did not speak to all the security officers about this. His testimony was that, if someone asked, he told them that the issue was not that simple because the collective bargaining agreement might have to be changed. Tr. 215–216. Moreover, three different security officers credibly testified that they were not told of any change to the bargaining agreement in connection with the vote. Tr. 151–152, 225–228. In these circumstances, as well as the lack of documentary explanation or explicit language on the ballot, I am unable to find that the voters were fully informed of the ramifications on the bargaining agreement of the Farrell seniority vote. I also find that Wigley was expressing his own view of the possible ramifications on the bargaining agreement. In any event, as I find and explain later in this decision, the grant of past seniority for Farrell did not require a change in the bargaining agreement.

Exh. 20.[8]

On December 2, 2016, counsel for Akal sent Tunis an email stating that Farrell was not terminated by Akal Security, but was simply removed from the contract for a period of time due to an extended medical leave. The email continued that the Employer would not publish a new seniority list unless so notified by Respondents "that they wish for a change to be made." GC Exh. 20.

On January 23, 2017, Tunis sent still another letter to Miller again raising the failure of Respondents to file a grievance on behalf of Farrell's past seniority. Tunis made reference to Miller's previous response, but told him that Akal took a contrary position to that of Respondents on this issue. He referenced the email from Akal's counsel mentioned above to the effect that Farrell was not terminated in January 2015, and included the email as an attachment to the letter. Tunis also attached documents showing that Akal restored Farrell's company seniority with regard to benefits. He again urged Respondents to process a grievance on Farrell's union seniority and told Miller that Akal's support should result in a favorable determination on Farrell's past seniority. He also again reminded Miller of Respondents' duty of fair representation. GC Exh. 20.

In a January 23, 2017 email to Tunis, Miller responded to Tunis' letter of the same day. He stated that Farrell was separated from the bargaining unit in January 2015, pursuant to Section 2.2 E. of the collective bargaining agreement. Miller also asserted that the settlement of the original grievance did not include a remedy about seniority and Farrell's seniority was determined in accordance with the collective bargaining agreement. He ended by stating that the matter was "considered closed." GC Exh. 21.

Miller testified about how he treated the past seniority of Reuther and Farrell, two identical situations—removal from the contract because of on-the-job injuries that led to their placement on workmen's compensation and medical leave, with the same opportunity to return to work, as well as the same applicable seniority provision that was administered by Respondents. I did not find Miller's testimony in this respect reliable. He seemed unduly argumentative and even inconsistent when he explained that he could not represent Farrell because he was not in the unit when Respondents did in fact represent Farrell in the grievance over his removal from the contract. See Tr. 202–206. He also appeared stubbornly adhering to a particular reading of the seniority language in order to support a litigation position, especially since he did not read the seniority provision the same way when he granted Reuther's past seniority. Nor did he offer any other specific examples as to how the seniority provision was actually read. In the end, he admitted that his treatment of Reuther's seniority was a "mistake" (Tr. 208) that was not ever corrected. I also find that testimony not credible. Accordingly, I shall give no special weight to Miller's reading of the seniority provision and will independently analyze it in all the circumstances, as shown later in this decision.[9]

On February 1, 2017, Farrell filed the initial charge in this case, which dealt with the seniority issue. The complaint on that charge issued on June 28, 2017. GC Exh. 1(a) and (c).

Complaints to the Employer about Farrell

On September 27, 2017, Reuther came into District Superintendent Kamage's office and complained that Farrell was wearing an i-watch which had internet and phone capability. Tr. 29–30, Jt. Exhs. 3 and 12. This was arguably against a Marshals Service directive against having cell phones or other electronic devices while on duty. GC Exh. 3. Employees were reminded of this directive in a memo to all security officers by Kamage on August 24, 2017, and all employees signed a form agreeing that they had received the reminder. GC Exhs. 4 and 5. The memo reminded employees that no telephones or electronic devices were permitted, and that any security officers in violation would be charged with a "performance violation" that "can result in time off up to and including discharge." GC Exh. 4. Reuther admitted that his complaint to Kamage was based on an alleged violation of the directive against cell phone use. Tr. 154.

Contrary to his usual practice in handling employee concerns, Reuther had not talked to Farrell about his i-watch before complaining about it to Kamage. Tr. 154. His differences with Farrell, who was one of two union officials who opposed the grant of his past seniority in 2013 and who failed to support him in the overtime fraud dispute, is clear on this record. But his testimony specifically mentioning Farrell elevates those differences to outright animus for the latter's positions on internal union matters. Reuther testified that he had to go to the International to resolve his seniority at the time because he "got no help from the Local Union, which Mr. Farrell was part of." Tr. 162. He also testified that he believed that Farrell caused David Wehrer, a fellow security officer, to file a charge against him with the Labor Board. Tr. 158.

When Reuther came into Kamage's office to complain about Farrell's use of the i-phone, he said that he did not see Kamage use the i-phone, but that two other security officers told him about the matter. When Kamage asked who the two security officers were, Reuther declined to reveal their names, stating that they came to him in confidence. Reuther stated that the officers wanted him to talk to Kamage because "I have access to your office." In these circumstances, Kamage concluded that Reuther was speaking to him in Reuther's capacity as a representative of Local 129. Tr. 31–32. I find that that was a reasonable conclusion.[10]

[8] The above was contained in Tunis' subsequent letter to Miller, who testified extensively in this trial, but did not deny Tunis' version of the conversation.

[9] It is ironic that, in support of their denial of Farrell's past seniority in the present case, Respondents point to Farrell's view as to the meaning of the seniority provision of the bargaining agreement when he unsuccessfully pleaded against the grant of Reuther's past seniority in 2013. R. Br. 49–51. But, in my independent review of the seniority provision, I will likewise not rely on Farrell's previous reading of it.

[10] Reuther testified that he went to Kamage with fellow union officer Wigley. Tr. 154. Wigley testified, however, that he could not recall accompanying Reuther in his complaint to Kamage. Tr. 222. If Reuther is to be believed, the fact that two union officials went in to talk to Kamage confirms that, at the time, Reuther was acting in his capacity

Kamage investigated Reuther's complaint by first talking to Farrell, telling him that Reuther had made the complaint. Farrell said that the i-watch does not work unless one carries a connected cell phone on his person. Farrell also said he did not carry his cell phone on his person and that the phone was in his locker. Tr. 29–30,105. Kamage later did some on-line research and confirmed that what Farrell had said was true. He then reported the complaint and the results of his investigation to William Pugh, his contact with the U.S. Marshals Service. Pugh agreed that the i-watch could be worn as long as it did not have phone or internet capability. Tr. 29–31, 105-106. Reuther's complaint was thus found not to have merit. Tr. 35, 36.

Later that same day, Kamage told Reuther the result of his investigation and that Farrell could continue wearing the i-watch. Tr. 36. He also confirmed that other security officers could wear such a watch. Tr. 67–68. Reuther stated that he did not "like" Kamage's determination and complained that Farrell had called him a "rat." Kamage told Reuther to "calm down," that he knew that Reuther and Farrell did not like each other, and he was not "going down that road." But, according to Kamage, Reuther's "complaint continued" in another form, in the "same time frame." Tr. 36–37.

According to Kamage, the i-watch matter continued when Farrell received a vulgar call on his cell phone, which he mentioned to Kamage. Tr. 28, 37. After he learned that Reuther had complained about his i-watch. Farrell confronted Reuther and asked Reuther why he had made his complaint. Reuther told him, "the guys were complaining." When Farrell asked who was complaining, Reuther said he would not tell him. Tr. 105. Farrell later went up to the control room, where he noticed, from a phone bank that captures all the outgoing phone numbers, that there had been two phone calls from the control room to his personal cell phone number. Tr. 106. Sometime later, Farrell checked his cell phone and discovered the vulgar voice-mail message that he identified as having come from Reuther, who was berating him about the i-watch on his wrist. Tr. 108.

Because he was on vacation at the time of the discovery of the cell phone message, Kamage suggested that Farrell contact the Marshals Service or the Federal Protective Service (FPS), which handles security on federal property. Tr. 28, 37. When he returned from vacation, Kamage became concerned that this might involve "a criminal matter." Tr. 37. He therefore undertook an investigation of the matter in December of 2017. Jt. Exhs. 3 and 12. Since Farrell told Kamage that he suspected Reuther had made the call, Kamage and an official from FPS first interviewed Reuther, who denied making the call. Tr. 38. Later, they spoke with Farrell, who had a voice-mail tape of the call. After listening to the tape, Kamage concluded that the call was indeed vulgar and concerned Farrell's i-watch, about which Reuther had made the earlier complaint. Kamage also determined that the call came from the control room at the Employer's work site, which had cameras covering the various security officer stations. He investigated the matter further and concluded that, at the time the call was made, the cameras were zoomed in on Farrell and Reuther was on duty in the control room. Kamage thus concluded that Reuther had made the call. Tr. 38–40.

After his investigation of the vulgar cell phone call, Kamage again spoke with Reuther and told him that he concluded that Reuther had made the call to Farrell about the i-watch. Reuther admitted that he was watching Farrell from the control room, but stated that he was only trying to determine whether to buy the watch. Kamage questioned that statement, asking Reuther why then would he not just ask Farrell about it. Kamage also told Reuther that he was supposed to be working, not watching Farrell. Tr. 40–41.[11]

Complaints to the Employer about Wehrer

When he testified in this proceeding, David Wehrer had been employed as a security officer by the Employer for about 3 years. Tr. 115. The evidence shows that there were dueling charges of harassment by Reuther and Wehrer against each other made to District Superintendent Kamage. Wehrer complained to Kamage about Reuther's alleged harassment of him. Tr. 65-67. And Reuther had made complaints to Kamage about Wehrer, one about Wehrer leaving his post and another about not properly having control of his firearm. Tr. 41–42. According to Wehrer, Reuther also complained about his alleged body odor, leaving his post and improper use of firearms. Tr. 115–120. But the first two complaints about leaving his post and improper use of a firearm were not harassment; they were serious and justifiable complaints, which Kamage took seriously and investigated. Indeed, Wehrer was admonished for the firearms incident. Tr. 39, 41–44.

Wehrer supported Farrell in his fight to have his past seniority restored, including participating in the Board investigation of Farrell's original charge. During that investigation, he mentioned the alleged harassment against him by Reuther. He filed a charge with the Board on that matter on March 20, 2017, which was docketed as Case 04–CB–195249. The charge was subsequently withdrawn. Tr. 122–123,134–135, Jt. Exhs. 5 and 12.

On July 3, 2017, Reuther submitted a written complaint about Wehrer harassing him and asked Kamage to put a stop to it.[12] Here is the complaint in its entirety (GC Exh. 6):

> On November 14th 2016, I, Robert Reuther, while employed as a court security officer was the subject of a false harassment claim by a fellow employee David Wehrer. Mr. Wehrer

as a union representative. In view of Kamage's testimony set forth above, and because of Reuther's general unreliability as a witness, as I have previously mentioned, I specifically discredit Reuther's testimony that he did not go to Kamage as a union representative.

[11] The above findings with respect to the i-watch incident and its aftermath are based on the credible and mostly uncontradicted testimony of Farrell and Kamage. A tape of the call was received in evidence by stipulation, but it is undecipherable except for the words, "turn that fucking hand over, Joe." Jt. Exhs. 6, 6(a) and 12.

[12] According to Kamage, Wigley was with Reuther when Reuther submitted his complaint about Wehrer. When Kamage asked why Wigley was present, Reuther said it was because he wanted union representation. Tr. 44–46. Wigley did not remember being with Reuther on that occasion, but, although he remembered talking to Reuther about the matter, he credibly testified that he did not join Reuther in the complaint. Tr. 220.

> made this false claim to the employer Akal Security, After Mr. Wehrer was unsuccessful with this claim, he then went on to report another false harassment claim to the National LaborRelations Board on March 20th 2017. On May 1st 2017 Mr. Wehrer attempted to place a grievance at my expense for one hour of overtime that I had received! After being questioned by acting senior lead Joseph Williams, Mr. Wehrer admitted he would not have made the complaint if it "had been anybody but me" These actions are clearly violations of Akals core values.
>
> I have been targeted by this man which I believe is because of my position as a local union official. This is discrimination under a number of federal laws which prohibit this type of harassment of a protected class. I expect this matter to be addressed forcefully as has been in the past when oneemployee made just one false claim against another officer.

Kamage also investigated the above complaint. Wehrer's complaint about Reuther's overtime was not deemed harassment because it was valid, even though Reuther was found not to have done anything wrong. Kamage also told Reuther that he was not going to do anything about the NLRB matter. He essentially resolved Reuther's harassment complaints by wisely utilizing benign neglect. Tr. 41–48, 65–66.

On July 27, 2017, Wehrer wrote a letter to International Representative Miller, referring to his having earlier reached out to Miller back in November 2016 about Reuther's alleged harassment of him. R. Exh. 3 . At that time, Wehrer had apparently mentioned the body odor matter, the firearm incident, the complaint about Wehrer's leaving his post, and another matter, the change of a name plate on his locker. These alleged incidents of harassment were also mentioned in the letter to Miller. See R. Exh. 3. When he was cross-examined concerning his complaints about the harassment by Reuther, Wehrer admitted that those he mentioned to Miller were the only ones he was complaining about. Tr. 126–127. He also admitted that one, leaving his post, was made to the Employer and resolved in his favor. In addition, he admitted that he did not know, at the time, who made the complaint about his improper control of a firearm. But he further admitted that there was another prior admonition about lack of control of his firearm by his lead officer. Tr. 127–131. Wehrer further admitted that he did not know who changed the name plate on his locker. Tr. 132. Finally, in his letter to Miller, Wehrer said that the complaints about his body odor were "anonymous." R. Exh. 3.

According to Wehrer, sometime in September of 2017, he had a conversation with Reuther and Wigley in which his July 27 letter to International Representative Miller was discussed. Wehrer told them he wanted to "bury the hatchet," presumably concerning his differences with Reuther, but, according to Wehrer's direct testimony, Wigley brought up the letter to Miller and said "you're fuck[ed]," and "we don't want to have nothing to do with you." Tr. 122–123. Later, on redirect, Wehrer amplified his testimony about the conversation by describing it as heated and added that Wigley said, "I told you to stay away from Joe Farrell, that he was no good," and "a low life scum bag." Tr. 135–136.

Wigley's testimony about this matter was different. He testified that Wehrer came to him alone. Wehrer told Wigley about his letter to Miller and that he wanted Wigley to talk to Reuther about "burying the hatchet." Wigley told Wehrer that this would take time and advised Wehrer to leave Reuther alone. Wigley thereafter contacted Miller and asked for a copy of Wehrer's actual letter to Miller. He then went back to Wehrer and told him that Wehrer's prior effort to bury the hatchet was contradicted by the claims he made in his letter to Miller. Wigley told Wehrer that he could not trust him anymore and that he did not want to talk to Wehrer unless he had a union or job related matter to discuss. Tr. 218–219. Wigley specifically denied telling Wehrer that he was "fuck[ed]" or calling Farrell a "low life scum bag." Tr. 219.

I credit Wigley's testimony about his conversations with Wehrer concerning the Miller letter. Wigley impressed me as a candid and truthful witness who testified with clarity and detail about this matter. I do not credit Wehrer, who rambled quite a bit in his testimony. He also seemed prone to exaggeration, as shown by his elaboration on redirect about his conversation with Wigley. Moreover, some of his claimed harassment was trivial and he seemed to blame Reuther for incidents about which he could not name the perpetrators. In my view, Wehrer also exaggerated his support of Farrell. These exaggerations were an effort, it seemed to me, to support his likewise exaggerated and unsupported testimony that Wigley and Reuther wanted to get him fired, something he admittedly never heard either Wigley or Reuther say. Tr. 134.

Discussion and Analysis

The Farrell Seniority Issue

The General Counsel alleges that Respondents violated Section 8(b)(1)(A) of the Act by failing to file a grievance on behalf of Farrell's failure to obtain his past seniority upon his return to work after a medical leave of absence. According to the complaint, the failure to file such a grievance was because of Farrell's internal union activities and his disagreements with officials of Respondent and because the treatment of Farrell in this respect was arbitrary. This brings into play a union's duty of fair representation. That duty requires that a bargaining agent treat the employees it represents in a manner that is not arbitrary, discriminatory or in bad faith. *Vaca v. Sipes,* 386 U.S. 171, 190 (1967). See also *Amalgamated Transit Union Local 1498 (Jefferson Partners L.P.),* 360 NLRB 777, 778 (2014). Failure to file a grievance for the unlawful considerations mentioned above amounts to a violation of the duty of fair representation and thus of Section 8(b)(1)(A) of the Act. See *Auto Workers Local 417 (Falcon Industries)*, 245 NLRB 527, 534–535 (1979); and *Service Employees Local 579 (Beverly Manor Convalescent Center),* 229 NLRB 692, 695–696 (1977).

Respondents deny that they acted arbitrarily, discriminatorily or in bad faith in deciding not to pursue a seniority grievance, specifically denying that Farrell's internal union activities were a consideration in their decision. Respondents also contend that their decision was based a reasonable interpretation of the applicable bargaining agreement, specifically the provision on union seniority. It is well settled that a bargaining agent is afforded a "wide range of reasonableness" in serving the unit it represents. Accordingly, a union does not violate its duty of

fair representation where its failure to file a grievance is based on a reasonable interpretation of the bargaining agreement or a good faith evaluation of the merits of a grievance. The Board does not undertake to determine whether the union's interpretation was correct, but rather whether it was reasonable. *Auto Workers Local 651 (General Motors Corp.),* 331 NLRB 479, 479–480 (2000), citing relevant authorities.

The standard of reasonableness does not change in circumstances where, as here, the union may have permitted the decision to be influenced by a vote of the membership of the unit that includes those who may be adversely affected. See *Transit Union Division 822*, 305 NLRB 946, 949–953 (1991), citing relevant authorities. Indeed, as the Board has stated, a union may not escape a violation of its duty of fair representation by taking a position simply "because a majority of its members want it to." *General Truck Drivers Local 315*, 217 NLRB 616, 619 (1975).

Applying the above principles to the facts of this case—which clearly show that Respondents failed to file a grievance over the restoration of Farrell's past union seniority after he returned to work in October 2016, despite repeated requests to do so, I find that Respondents' failure to file a grievance over the restoration of Farrell's past seniority or to restore such seniority on their own amounted to a violation of their duty of fair representation. Indeed, the record shows that Respondents did not even have to file a grievance. The evidence is clear that the Employer ceded union seniority, that is, seniority that governed job bids and assignments, exclusively to Respondents to handle on their own. This is also shown by International Representative Miller's intervention to grant Reuther's past seniority upon his return to work after similarly coming off medical leave in 2013. Miller's determination to grant Reuther's union seniority was simply followed by an informal and perfunctory notification of that decision to a representative of the Employer, who readily agreed to Miller's decision. At that time, Miller did not require the filing of a grievance.

In contrast, when Farrell came off his medical leave of absence, Respondents treated him differently. Miller admitted that the seniority contract provision was the same in both Reuther's situation and that of Farrell. Tr. 189. But, contrary to their treatment of Reuther, in Farrell's case, Respondents did not file a grievance seeking to restore his seniority, exercise their authority to restore Farrell's past seniority on their own, or ask the Employer for approval to do so. Instead, they declined to restore Farrell's past seniority, contrary to their treatment of Reuther. This was clearly arbitrary and discriminatory since the situations were the same. Indeed, if anything, Reuther's claim to past seniority had less merit than Farrell's. Reuther had been employed for only 6 months before he was injured and stopped working as a security officer. He was then on medical leave for almost 7 years until he was returned to work. Farrell was employed over 6 years before he was injured and stopped working. He was on medical leave for 2-1/2 years before he was returned to work. Also, unlike Farrell, Reuther was removed from the contract by one employer and had his seniority restored to his original hire date under a different employer. Such discriminatory and arbitrary treatment amounts to a violation of the duty of fair representation.

The vote of the Local 129 membership does not shield Respondents from their otherwise unlawful actions or, in this case, inactions, as shown by reference to the *Transit Union* and the *Local 315* cases, cited and discussed above. But the vote does provide obvious evidentiary support for the violation, as Respondents recognize since they take a diversionary tack on the matter in their brief (R. Br. 52–53): They contend that the membership vote was not addressed to the filing of a grievance over Farrell's past seniority, but rather was addressed to whether the seniority language of the collective bargaining agreement would be modified. But that position is contrary to the language of the ballot, which made it quite clear that the issue was restoration of Farrell's past seniority. Thus, the membership vote itself buttresses the finding of arbitrary action and discrimination. Moreover, further support for that finding comes from the fact that no such formal vote was taken in Reuther's case, even though the record shows there were objections from other unit members at the time and indeed at least one grievance was filed objecting to the grant of Reuther's past union seniority. Respondents' suggestion (R. Br. 53 fn. 28) that Reuther also sought approval of the membership is unavailing. The suggestion relies on hearsay accounts from Reuther that, at the time of his seniority dispute, he spoke with affected members who did not object. Tr. 162 and Jt. Exhs. 8 and 12. I cannot use those accounts to support reliable findings of fact, not only because they are hearsay, but also because they come from an otherwise discredited witness. In any event, those hearsay accounts, presumably based on oral conversations whose details are not possible to assess, are a far cry from the formal vote taken in Farrell's situation.[13]

Respondents' essential defense—that their position was based on a reasonable interpretation of the seniority provision in the bargaining agreement—is totally without merit. That position is contrary to the interpretation made in Reuther's situation, which was the same as Farrell's and involved the same seniority provision. Significantly, the union seniority provision that defines termination of seniority does not mention the treatment of employees coming off medical leave or workmen's compensation. The absence of such mention in a provision that affirmatively and specifically lists conditions that "shall" result in termination of seniority strongly supports the conclusion that employees coming off medical leave or workmen's compensation do not lose their seniority. This comports with the venerable principle of contract interpretation known as *expressio unis est exclusio alterius*. See Principles of Contract Interpretation: Interpreting Collective Bargaining Agreements, Grenig, 16 Cap. U. L. Rev. 31, 46–47 (1986).

Respondents' specific contention, as shown in Miller's January 23, 2017 email to Farrell's private attorney (GC Exh. 21) as

[13] The membership vote on Farrell's past union seniority was not conducted in a manner that would yield valid results in any event. The vote was hastily arranged the day before Farrell came back to work. It also appears that notification of the vote was given by word of mouth, with no detailed explanation of the issues or opportunity to weigh the previous treatment of the seniority issue, or the impact, if any, on the Employer's view that Respondents had complete authority to set union seniority rules as they saw fit. See *Local 315*, cited above, 217 NLRB at 619.

well as his testimony (Tr. 188-189), is that Farrell "was permanently transferred out of the bargaining unit," under Section 2.2 of the contract's seniority provision, which governs termination of union seniority. This contention is repeated in Respondents' brief (R. Br. 43–45). But that is an erroneous reading of Section 2.2, unsupported by any relevant evidence of past practice under that provision and contrary to its plain meaning. Farrell was not transferred out of the bargaining unit—he was not transferred at all; nor was he "permanently" dispensed with or moved anywhere. As shown above, the Employer repeatedly confirmed that Farrell was not terminated at all and remained an employee, able to return once his medical condition improved and a position became available. This was the same condition under which Reuther was released from the Marshals contract. Nor was the cited language read the same way when Miller restored Reuther's past seniority—the only record evidence of relevant past practice in circumstances that mirrored those of Farrell. Finally, none of the other specific conditions listed in Section 2.2 for the termination of an employee's seniority apply in Farrell's situation—as they did not apply in Reuther's situation. Thus, I find that Farrell retained his past union seniority, just as Reuther did.[14]

In accordance with the above analysis, I not only find that Farrell retained his past union seniority, but I also reject as without merit any contention by Respondents that granting Farrell's past seniority required a change in the seniority provision of the bargaining agreement. Respondents had been ceded complete authority on union seniority. I also reject Miller's testimony, in apparent recognition of his disparate treatment of Reuther and Farrell in otherwise like situations, that he made a "mistake" in Reuther's case. Tr. 208. That is a convenient, but non-credible, after-the-fact excuse. Respondents never sought—until this day—to correct the alleged "mistake" to provide a consistent reading of the seniority provision by revoking Reuther's past seniority. Their inconsistent readings of the seniority provision belie any effort to cast Respondents' present reading of the seniority provision reasonable. But, even in isolation, their present reading of the seniority provision is unreasonable—and wrong. Indeed, as shown above, Respondents' real "mistake" was in not granting Farrell's past seniority, just as they granted Reuther's past seniority. See *Union de Obreros de Cemento Mezclado (Betterroads Asphalt)*, 336 NLRB 972, 973 (2001), where the Board found that a union's reading of a bargaining agreement's seniority provision was unreasonable and contrary to the agreement.[15]

I also reject any attempt to distinguish the Farrell situation from the Reuther situation on the ground that Farrell was removed from the contract because he failed to take his annual physical while on workmen's compensation. Despite the fact that Farrell's original removal letter mentioned the lack of a physical, Farrell was specifically excused from taking his annual physical while he was on workmen's compensation. And it is clear from the documentary evidence that the Employer repeatedly stated that Farrell remained an employee notwithstanding being on medical leave. Indeed, there is no evidence that Reuther took annual physicals while he was on workmen's compensation, and he was on medical leave for a much longer period that Farrell. Yet he was granted his past union seniority without regard to whether or not he took his annual physical.

The above, without more, clearly supports a finding that Respondents' failure to grant Farrell his past seniority, as they did for Reuther, was discriminatory and arbitrary, in violation of their duty of fair representation. Although it is not essential to the violation, I also find that Respondents' failure to seek or grant Farrell's past seniority was motivated by Farrell's internal union activities and disagreements with Respondents, as the General Counsel alleges. Farrell was a past union officer who had objected to the grant of past seniority to Reuther, who was, at the time of Respondents' consideration of Farrell's past seniority, himself a union officer. Reuther's own testimony in this case shows that he still—five years later—holds an animus against Farrell for his objection to Reuther's grant of past seniority, a position which, of course, Farrell was entitled to take as part of normal union or protected activity. Reuther, of course, was an integral part of the Respondents' decision-making with respect to denying Farrell's past seniority that dated from the failure to include a restoration of Farrell's past seniority in the resolution of his prior grievance, despite Farrell's repeated requests that he be treated just like Reuther. Respondents' position on this matter continued through the membership vote and thereafter. The inference is thus clear that Respondents' position in denying Farrell's past seniority was an effort to protect the discriminatory and contrary grant of past seniority to Reuther. Reuther's continuous antagonism to Farrell is also shown by his subsequent meritless complaint to the Employer, which has been found, as shown below later in this decision, to separately violate the Act. Thus, the General Counsel has shown that Respondents' disparate treatment of Farrell was the result of Farrell's protected concerted and union activity and Respondents have not shown that that such disparate treatment was based on legitimate considerations that would

[14] In his testimony, Miller briefly alluded to the restoration of seniority provision of the bargaining agreement, Section 2.3 of the agreement. He opined (Tr. 188) that Farrell did not qualify under the language of that section, which states that an "[e]mployee returned to work after overturning a medical disqualification shall regain their [sic] seniority back to the original date of hire." Respondents' brief makes the same point. R. Br. 46-47. There is, of course, no need to reach the restored seniority language because, as I have found above, Farrell's seniority was never terminated. But, here again, Miller's reading of this language on restored seniority is tortured and contrary to common sense. And it is contrary to Miller's reading (or non-reading) of the same language in Reuther's case. Significantly, the language is meaningless unless it applies to employees who return from an extended medical leave upon regaining their health, as was the situation both in Farrell's case and in Reuther's case. There is no rational basis for treating those who have successfully overturned a medical disqualification differently from those who simply return to health after being on medical leave; and Respondents have offered no evidence to support a contrary view. Nor have Respondents shown that the restored seniority language was read the way Miller now reads it in any other situation.

[15] It is well settled that the Board is not precluded from interpreting the meaning of a collective bargaining agreement if necessary to decide or remedy an unfair labor practice issue before it. *NLRB v. C&C Plywood Corp*., 385 U.S. 421, 428 (1967); and *NLRB v. Strong Roofing & Insulating*, 393 U.S. 357, 360–362 (1969).

have resulted in the same decision in the absence of Farrell's protected activities. I have already rejected the notion that Respondents had a reasonable basis to read the seniority provision against restoration of Farrell's past seniority. Indeed, there is really no evidence of a benign reason for Respondents' conduct, except for Miller's discredited testimony that he made a "mistake" in granting Reuther his past seniority.

In these circumstances, I find that the Respondents' failure either to file a grievance to restore Farrell's past seniority or, in accordance with the Employer's view that such seniority was solely within the province of Respondents, to outright grant Farrell's past seniority, amounted to a violation of their duty of fair representation and thus Section 8(b)(1)(A) of the Act.[16]

The General Counsel also alleges a separate violation of the duty of fair representation in the actual vote of the Local 129 membership to deny Farrell's past seniority (GC Br. 30–35), referring to paragraphs 6(a) and (b) of the complaint (GC Exh. 1(f)), and *General Truck Drivers Local 315*, cited above at 217 NLRB 616. I do not pass on that specific allegation of the complaint. Although, as I have stated, a union may not justify otherwise arbitrary or discriminatory conduct on the basis of a vote of the union membership and the membership vote in this case was an evidentiary piece of the violation found, here, unlike in the *Local 315* case, the Respondents' actions in denying Farrell's past seniority or in filing a grievance over the matter were not based solely on the vote of the union membership. The General Counsel erroneously suggests (GC Br. 19–20, 32) that Miller's November 2016 submission to the International's Executive Board asserted that the membership vote was the main reason for the denial of Farrell's past seniority. But that document lists other reasons as well, including Miller's reading of the seniority provision of the bargaining agreement and the absence of any mention of seniority in the settlement of the grievance regarding Farrell's alleged termination. GC Exh. 17. Indeed, it is not clear from the Board's decision in the *Local 315* case whether the violation in that case was based solely on the vote of the membership. It is true that the Board in Local 315 found that the vote itself in that case was flawed and that "the violation consists . . . in the unfairness in its decision-making process" (217 NLRB at 619), but neither the conclusion of law nor the remedial order made a specific reference to the membership vote. Id. at 620.

The membership vote in this case was not essential to the Respondents' decision-making; rather it was simply used to buttress an otherwise unlawful position that Respondents defended on grounds other than the membership vote—their interpretation of the seniority provision of the bargaining agreement. See R. Br. 42, where Respondents assert that their actions were "directed entirely" to their reading of the seniority provision of the bargaining agreement. Nor, in view of my finding of a violation on a different, more general basis, is it necessary to consider the specific allegation urged here by the General Counsel, particularly as it would not add significantly to the remedy. Indeed, my unfair labor practice finding and its remedy can be read to include any and all ways Respondent utilized to deny Farrell his past union seniority.[17]

[16] As parties to the collective bargaining agreement, both parties were acting in concert in failing to grant Farrell's past seniority. They are thus both liable on this part of the case.

The Attempt to Cause Employer Discrimination against Farrell and Wehrer

The General Counsel alleges that Respondent Local 129 filed complaints with the Employer about Farrell and Wehrer because of their protected concerted activity in an attempt to cause the Employer to discriminate against them in violation of Section 8(b)(2) of the Act. More specifically, the allegation is that such complaints were made concerning Wehrer in early July 2017 because he filed a Board charge against Local 129, and cooperated in the investigation of another Board charge involving Farrell; and such complaints were made concerning Farrell in late September 2017 because he complained to Local 129 about the denial of his past seniority and filed a charge about the denial of his past union seniority with the Board. According to the complaint, such conduct on the part of Local 129 also amounted to a violation of its duty of fair representation and of Section 8(b)(1)(A) of the Act.

A union violates Section 8(b)(2) of the Act when it causes or attempts to cause an employer to discriminate against an employee in violation of Section 8(a)(3). In determining whether a union has violated Section 8(b)(2) in this respect, the Board has applied both the analytical framework of *Wright Line*[18] and that of the duty of fair representation.[19] *Caravan Knight Facilities*, 362 NLRB 1802, 1804–1805 (2015), enforcement denied on the facts of the violation, sub nom. *United Auto Workers v. NLRB,* 844 F.3d 590 (6th Cir. 2016). Citing numerous authori-

[17] For the first time in their posthearing brief (R. Br. 38–41), Respondents contend that the complaint allegation regarding failure to file a grievance over the denial of Farrell's past seniority is time barred by Sec. 10(b) of the Act because Farrell knew that Respondents intended to deny him his past seniority when they failed to include that remedy in the September 2015 grievance settlement, more than 6 months prior to the charge that gave rise to the complaint allegation being considered in this case—the failure to file a grievance over Farrell's past seniority upon Farrell's return to work in October 2016. But Section 10(b) is a statute of limitations, not an evidentiary rule. It is well settled that evidence outside of the 10(b) period is admissible to shed light an unfair labor practice that occurred within the 10(b) period. See *Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 414, 429 (1960). Thus, Respondents' failure to include a restoration of Farrell's past seniority in the September 2015 grievance settlement provides a relevant evidentiary backdrop to their denial of his past seniority upon his return to work in October 2016, as I have mentioned above. But, insofar as it asserts a statute of limitations bar against consideration of the allegation itself, Respondents' 10(b) defense is without merit. First of all, Respondents never mentioned in their answers that they were asserting such a defense. And it is clear that Section 10(b) is an affirmative defense that must be affirmatively pled, and, if not, it is waived. See *EF International Language Schools, Inc.,* 363 NLRB No. 20, slip op. 1 at fn. 2 (2015), enfd. 673 Fed.Appx. 1 (D.C. Cir. 2017). In any event, the denial of Farrell's past seniority and failure to file a grievance upon his return to work in October 2016 and thereafter involved a discrete set of circumstances, separate and apart from Respondents' failure to address the seniority issue in settling the grievance that dealt with Farrell's alleged "termination."

[18] *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[19] See *Vaca v. Sipes*, cited and discussed above in this decision.

ties, that decision, at 1805–1806, spells out the following details about such analytical frameworks.

Under the duty of fair representation framework, when a union causes or attempts to cause an employer to discriminate, there is a rebuttable presumption that the union acted unlawfully because it has used its power to affect an employee's livelihood, thus encouraging union membership. The union may rebut that presumption by demonstrating that it acted pursuant to a valid union security clause or that its actions were taken in good faith to effectively represent its constituency as a whole. In the latter case, the good faith reporting of violations of employment rules or policies is a factor that rebuts the presumption of a violation. Under the *Wright Line* framework, a similar presumption applies if the General Counsel can show that a reason for the attempt to cause discrimination is the employee's protected activity. That presumption may be overcome if the union shows that it had a legitimate reason for its action and that its action would have been undertaken even in the absence of the employee's protected activity. Under both frameworks, the General Counsel succeeds if it is shown that the union's reason for its action was a pretext, that is, that it was not the true reason for the action. See also *SSA Pacific, Inc.*, 366 NLRB No. 5, slip op. at 17 (2018).

The Complaint about Farrell

I find that Respondent Local 129 violated Section 8(b)(2) of the Act by virtue of Reuther's complaint to Kamage concerning Farrell's alleged use of a prohibited electronic device. First of all, there is no doubt that, in making the complaint, Reuther was acting as an agent of Local 129. He himself testified that he did not see Farrell using the electronic device, but brought the complaint of other unit members to the Employer and he did so because he had access to Kamage, presumably because he dealt with Kamage in his capacity as a union official. And Kamage credibly testified that he viewed Reuther as acting as a Local 129 representative. See *Security, Police and Fire Professionals of America*, *Local 444,* 360 NLRB 430, 430 fn. 2 (2014).

There is also no doubt that Reuther was attempting to have the Employer discipline Farrell. Reuther's complaint was admittedly made in the context of a recent reminder from the Employer that use of electronic devices on the job would result in discipline up to and including discharge. Thus, under the fair representation framework, Reuther's complaint to the Employer created a rebuttable presumption that Local 129 was using its power to affect Farrell's livelihood. Nor was that presumption rebutted by any credible evidence from which it could be concluded that Reuther's actions amounted to a good faith report of violations of Employer rules, particularly in view of the complete lack of merit in Reuther's complaint. Reuther's subsequent action in making a vulgar phone call to Farrell about the latter's use of the i-phone shows his bad faith in making the charge. In addition, the earlier violation of the duty of fair representation by Respondents in handling Farrell's past seniority, as well as Reuther's own testimony showing his animus against Farrell for the latter's opposition to Reuther's request for his past seniority, support this finding. Thus, I find that the violation has been established under the fair representation framework.

I also find a violation under the *Wright Line* framework. Reuther's complaint was motivated by his animus against Farrell for pursuing his past seniority claim, which had as its basis the contrary treatment of Reuther. Farrell had objected to the grant of Reuther's past seniority. Indeed, by the time of Reuther's complaint about Farrell's i-phone, Farrell had filed a charge with the Labor Board that resulted in a complaint against both the International and Local 129 for violation of their duty of fair representation. The complaint on that charge issued just two months before Reuther brought his complaint against Farrell. Reuther's animus against Farrell for the latter's intra-union and other protected activity is clear on this record, as mentioned above. Thus, I find that the General Counsel has initially shown that Reuther's complaint was motivated by Farrell's intra-union and other protected activity. Local 129 has not rebutted the initial inference of unlawful motivation by showing that the complaint would have been made for reasons other than Farrell's protected activity. According to Kamage's testimony, Reuther professed to be interested either in purchasing a similar i-phone or expressed the interest of other employees in making such a purchase and that is why he made the complaint. I find that reason clearly a pretext, as Kamage also apparently did when he asked Reuther why he did not just ask Farrell about the watch instead of watching and calling Farrell while he was supposed to be working. Accordingly, I find that the violation has been established under the *Wright Line* framework. See *Paperworkers Local 1048 (Jefferson Smurfit Corp.),* 323 NLRB 1042, 1044 (1997),

In these circumstances, I find that Local 129, through Robert Reuther, attempted to cause Farrell's Employer to discipline him in violation of Section 8(b)(2) of the Act, as alleged in the complaint. Reuther's conduct impacted Farrell directly and thus also tended to restrain and coerce him—and other employees—in the exercise of their protected rights in violation of Section 8(b)(1)(A) of the Act, as also alleged in the complaint.[20]

The Complaint about Wehrer

The General Counsel has not shown by a preponderance of the evidence that Reuther's July 2017 complaint to the Employer about Wehrer was violative of the Act. First of all, the General Counsel has not shown that Reuther's complaint was made in his capacity as an agent of Local 129. Wigley credibly testified that he did not join Reuther in his complaint, although he knew about it. And, although at one point Kamage testified he assumed that the complaint was being filed "on behalf of the union," he also testified twice that, when he asked what Wigley was doing there with Reuther, he was told that it was because Reuther wanted "union representation." Tr. 44-46. Although Reuther asserted that Wehrer made harassment complaints against him because he was a union officer, the gravamen of the complaint was that Wehrer was harassing him as an individual employee. Wehrer allegedly said he would not have made his complaints against Reuther if he were not a union

[20] As to the 8(b)(1)(A) violation, see *Security, Police and Fire Professionals of America, Local 444*, 360 NLRB 430, 435 (2014); and *Postal Workers*, 350 NLRB 219, 222 (2007).

officer. Thus, it was Wehrer's prior complaints, not Reuther's July 2017 complaint, which brought union considerations into the mix.

However, even if Reuther's complaint could be considered union action, his complaint was not an attempt to cause the Employer to discipline Wehrer for unlawful purposes under the *Wright Line* framework discussed above. Reuther simply wanted the Employer to stop Wehrer's harassment of him. Although Reuther mentioned that the harassment was against the Employer's "core values," there was no specific disciplinary action suggested or implied, contrary to the situation in the complaint about Farrell discussed above. The record does not include any details about the Employer's core values or any policy in that respect, much less evidence that disciplinary action was part of such policy. Nor was Reuther's complaint motivated by Wehrer's protected activities. Indeed, Reuther raised his own protected activities as a probable motive for Wehrer's actions. Although the complaint included a reference to Wehrer's charge with the Board, the reference was simply given as an example of Wehrer's continued harassment of Reuther; and Kamage made clear from the outset that he was not going to consider that aspect of the complaint. As indicated above, I have discredited Wehrer's testimony that Wigley made statements suggesting some kind of animus that Local 129 had against him, but even that testimony had nothing to do with Reuther's complaint to Kamage. It referenced Wehrer's letter to International Representative Miller.

Even if Reuther's complaint to Kamage could be said to support an inference that Reuther made his complaint because of Wehrer's protected activity, I find that the evidence shows that the complaint would have been made even in the absence of Wehrer's protected activity, in accordance with the applicable *Wright Line* burden shifting analysis. Reuther simply wanted the Employer to stop Wehrer's on-the-job harassment of him. And, in context, Reuther's complaint was simply a continuation of the personal dueling complaints by and against these two security officers that apparently drove Kamage to distraction. See Tr. 67. Thus, there was no violation under the *Wright Line* framework.

Nor has the General Counsel shown a violation under the fair representation framework. As indicated above, Reuther was not acting on behalf of Local 129 when he made his July 2017 complaint about Wehrer to Kamage. But, even if it could be concluded that he was, my findings above in connection with the analysis of the matter under the *Wright Line* framework establishes that Reuther's complaint was a good faith effort to report violations of employment rules or policies. Reuther asked the Employer to stop Wehrer's harassment of him under the Employer's "core values" policy. Thus, the General Counsel has not shown a violation under the fair representation framework.

Accordingly, I shall dismiss the complaint allegation that Reuther's July 2017 complaint to Kamage violated the Act.

CONCLUSIONS OF LAW

1. By arbitrarily and discriminatorily failing to file or process a grievance dealing with Joseph Farrell's past union seniority and/or failing to grant him such seniority on their own, with the approval of the Employer, Respondents breached their duty of fair representation and thus violated Section 8(b)(1)(A) of the Act.

2. By attempting to cause Farrell's employer to discriminate against him, Respondent Local 129 violated Section 8(b)(2) and 8(b)(1)(A) of the Act.

3. The above violations constitute unfair labor practices affecting commerce.

REMEDY

Having found that Respondents engaged in certain unfair labor practices, I shall order them to cease and desist from such conduct and to take certain affirmative action, including the posting of an appropriate notice, designed to effectuate the policies of the Act. The General Counsel seeks a remedy that Respondents request that the Employer reinstate Farrell's union seniority to his original date of hire and that they make Farrell whole for any loss of earnings and other benefits, as well as consequential damages suffered as a result of Respondents' unlawful conduct.

The normal remedy for a union's unlawful failure to file or process a grievance on behalf of an employee is an order requiring the offending union to request the employer to process the grievance, including the payment of reasonable legal fees for a separate attorney to handle the matter. If the grievance is not possible to be processed, and the grievance is shown to have had merit, the union is also required to make the employee whole for any losses caused by the union's improper handling of the grievance. *Iron Workers Local 377 (Alamillo Steel Corp.),* 326 NLRB 375 (1998); and *Rubber Workers Local 250 (Mack-Wayne),* 290 NLRB 817 (1998). See also *Postal Workers, Pensacola Area Local (Postal Service),* 362 NLRB 1080, 1081 (2015); and *Longshoremen ILWU Local 6,* 336 NLRB No. 104, slip op. 2 (2001) (not reported in Board volumes).[21]

Here, however, there is no need to order Respondents to request the Employer to process a grievance on Farrell's past union seniority or to await a compliance proceeding to determine whether such a grievance would have merit. The record shows that the Employer left union seniority of the kind Farrell sought—that which governed job bidding and assignments—to Respondents alone. Thus, there is no conflict between Respondents and the Employer that would require the filing of a grievance. The applicable seniority provision of the bargaining agreement itself provides that, only if there is an unresolved disagreement between Respondents and the Employer, "may" a grievance be filed. See Joint Exhibit 1, Section 2.1. Indeed, in Reuther's situation, Respondents decided to restore his past seniority and simply made a request to the Employer to restore

[21] Under the *Ironworkers* and *Rubber Workers* cases cited above, the respondent union has a choice of litigating the merits of the grievance either in the underlying unfair labor practice case or in the compliance proceeding. Where the union agrees to litigate the merits of the grievance in the unfair labor practice proceeding rather than in compliance, the remedy in the unfair labor practice proceeding may include a make whole remedy. See *State, County Employees AFSCME Local 1640 (Children's Home of Detroit),* 344 NLRB 441, 447–448 (2005).

his past seniority and the Employer perfunctorily agreed. Moreover, Respondents' position on the seniority provision of the applicable agreement was fully litigated in this proceeding. I have rejected the Respondents' position on the seniority provision and found that Respondents' reliance on the seniority provision of the collective bargaining agreement was not reasonable. Finally, my reading of the applicable seniority provision, as I have stated above, leads me to conclude that Respondents' reading of it is wrong and that the proper reading of it requires that Farrell's past union seniority be restored. Thus, assuming that a grievance would need to be filed, it would have been found to have merit.

Accordingly, there is nothing more to decide and no compliance proceeding is necessary. I will therefore order Respondents to restore Farrell's past union seniority in the same manner as was done in the Reuther situation. This is particularly apropos in view of particular circumstances of this case. The grievance-arbitration proceeding in which Respondents could have addressed the matter, but did not, has been completed with a settlement between Respondents and Akal. And a new employer, Paragon, has taken over the unit after the settlement. The equities also favor a resolution now in view of the passage of time since Farrell first raised the issue. See *Union de Obreros de Cemento Mezclado*, cited above, 336 NLRB at 973–974, where the Board found a violation of the duty of fair representation and ordered a make-whole remedy in the unfair labor practice proceeding after considering the merits of a grievance because the parties had already completed an arbitration proceeding, in which the union failed to represent the employee in a fair and impartial manner.[22]

In addition, Respondents shall make Farrell whole for any losses of pay and benefits suffered as a consequence of Respondents failure to grant or allow for the grant of Farrell's past union seniority, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), computed daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Tax compensation and Social Security reporting shall be in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143, slip op. at 1 (2013).[23]

I shall also order that Respondents reimburse Farrell for any reasonable legal fees he expended in seeking to convince Respondents to file a grievance about his past seniority or restoring it on their own. As mentioned above, such legal expenses are a traditional remedy in this type of case. Such legal expenses shall run from the date of Farrell's engagement of Attorney Frank Tunis until the filing of his unfair labor practice charge with the Board.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended[24]

ORDER

Respondents, the International and Local 129, their officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Arbitrarily and discriminatorily refusing to process a grievance with respect to employee Joseph Farrell's past union seniority and/or failing to grant him such past seniority on their own, with the approval of the Employer.

(b) In any like or related manner, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Immediately grant Joseph Farrell's past union seniority to the date of his original hire, and, to the extent necessary, promptly request Farrell's employer to concur with that grant of past seniority.

(b) Make Joseph Farrell whole for any losses of pay or benefits he may have suffered by the unlawful denial of his past union seniority, in the manner set forth in the remedy section of his decision.

(c) Reimburse Joseph Farrell for the reasonable legal fees expended in connection with his use of a private attorney from the date of his engagement of such attorney to the date he filed his first charge in this case.

(d) Within 14 days after service by the Region, post at their business offices and meeting places copies of the attached notices marked as "Appendix A" and "Appendix B," as appropriate.[25] Copies of the notice, on forms provided by the Regional Director of Region 4, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as email, posting on an intranet or an internet site, and/or other electronic means, if Respondents customarily communicate with members by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Respondent Local 129, its officers, successors and assigns, shall also cease and desist from attempting to cause Joseph Farrell's Employer to discriminate against him because of his protected concerted activity, and, in any like or related manner, restraining or coercing employees in the exercise of their rights

[22] Nothing in this remedy should prevent Respondents from seeking or implementing *in futuro* changes to the seniority provision of the collective bargaining agreement, provided such changes do not violate their duty of fair representation.

[23] Since Farrell returned to work with his past company seniority intact, it appears that his only monetary losses were pay for lost hours due to his erroneous union seniority.

[24] If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

guaranteed by Section 7 of the Act.

Dated, Washington, D.C. June 4, 2018

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT arbitrarily or discriminatorily refuse to process grievances with respect to employee Joseph Farrell's past union seniority and/or fail to grant him such seniority on our own, with the approval of his employer.

WE WILL NOT, in any like or related manner, restrain or coerce employees in the exercise of rights guaranteed under Section 7 of the Act.

WE WILL immediately grant Joseph Farrell's past union seniority to the date of his original hire, and, to the extent necessary, request Farrell's employer to concur.

WE WILL make Joseph Farrell whole for any losses of pay or benefits he may have suffered because of our unlawful denial of his past union seniority, with interest.

WE WILL reimburse Joseph Farrell for reasonable legal fees he expended because of his need to hire a private attorney to help resolve his seniority issue.

UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA INTERNATIONAL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CB-192246 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT arbitrarily or discriminatorily refuse to process grievances with respect to employee Joseph Farrell's past union seniority and/or fail to grant him such seniority on our own, with the approval of his employer.

WE WILL NOT attempt to cause employee Joseph Farrell's employer to discriminate against him for exercising his rights under the Act.

WE WILL NOT, in any like or related manner, restrain or coerce employees in the exercise of rights guaranteed under Section 7 of the Act

WE WILL immediately grant Joseph Farrell's past union seniority to the date of his original hire, and, to the extent necessary, request Farrell's employer to concur.

WE WILL make Joseph Farrell whole for any losses of pay or benefits he may have suffered because of our unlawful denial of his past union seniority, with interest.

WE WILL reimburse Joseph Farrell for reasonable legal fees he expended because of his need to hire a private attorney to help resolve his seniority issue.

LOCAL 129 OF THE UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA INTERNATIONAL **129**

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CB-192246 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.